Pacific & Orient Insurance Co Bhd v Mohammad Hafizi bin Bahari & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCC-449–09 OF 2020
LIZA CHAN J
30 APRIL 2023

Tort — Conspiracy — Conspiracy to defraud — Defendants involved in road accident — Plaintiff alleged defendants committed fraud and conspired to make false claim — Whether plaintiff established its claim on balance of probabilities

Civil Procedure — Judgment — Res judicata — Application by plaintiff to prohibit defendants from enforcing judgment — Whether action barred by res judicata in wider sense

The plaintiff sought an injunction against the defendants to prohibit them from enforcing the judgment obtained by them ('the SC judgment') in the sessions court ('the SC suit') and for declarations that the SC judgment was irregular and could not be the basis to commence any execution proceedings, damages for abuse of process, malicious prosecution, unjust enrichment and for the tort of threat of execution against the plaintiff without first obtaining a judgment against the plaintiff. The plaintiff was an insurer and had issued a policy to cover the motorcycle owned by one Thanabalan a/l M Rajamanickam ('Thanabalan'). The first and second defendants as the rider and owner respectively of a motorcycle had filed the SC suit in respect of an alleged accident with Thanabalan's motorcycle ('the accident'). The first defendant suffered multiple injuries including being paralysed as a result of the accident. Thanabalan had lodged a police report ('the first police report') that he collided into the second defendant's motorcycle. The plaintiff appointed adjusters to investigate the accident and to record a statement from Thanabalan. The adjusters reported that Thanabalan informed the adjusters that his motorcycle was not involved in the accident. Two years after his first police report, Thanabalan lodged another police report ('the second police report') to recant the first police report, stating that he was not involved in the accident and that after lodging the first police report, he was paid a sum of RM600 by one Indian male to make the first police report. The first defendant also lodged two police reports stating that he was riding the motorcycle which was involved in the accident with Thanabalan's motorcycle. In the High Court, the plaintiff obtained against Thanabalan a declaratory order to declare the policy void and unenforceable. Upon obtaining the declaratory order, the plaintiff instructed its solicitors to discharge themselves from further acting for Thanabalan in the

sessions court. The defendants proceeded with their case and obtained the SC judgment in their favour for a sum of almost RM4m where the learned sessions court judge adjudged that Thanabalan was 100% liable for the accident. The defendants demanded from the plaintiff the payment of the judgment sum arising from the SC judgment. The plaintiff then applied to intervene and to set aside the SC judgment and also filed the present action. Thanabalan made another police report ('the third police report') where he retracted the second police report and claimed that he was misled to make the second police report because he did not have a valid driving licence when the accident happened. The plaintiff's pleaded case in this action was that the defendants had committed fraud by lodging two false reports and had conspired with Thanabalan to make a false claim and having obtained the SC judgment against the plaintiff's insured, were now threatening to enforce and execute the judgment against the plaintiff. The defendants denied they had conspired with Thanabalan to defraud the plaintiff and contended that, inter alia, the plaintiff was estopped from challenging the SC judgment at this stage as the plaintiff was fully aware of the SC proceedings, had full knowledge and control of the defence of Thanabalan but had elected to walk away from putting its case for the SC's consideration.

Held, dismissing the claim with costs subject to allocatur:

(1) Other than alleging that the defendants had conspired with Thanabalan to commit fraud upon the plaintiff, the plaintiff had failed to plead in the statement of claim that there was an agreement between the defendants and Thanabalan; the agreement was for the purpose of injuring the plaintiff; and the acts done in the execution of the agreement which resulted in damage to the plaintiff. The plaintiff did not in his pleadings specify with clarity which forms of conspiracy its cause of action in conspiracy levelled against the defendants was pitched on. As the pleaded type of conspiracy was unclear, the pleading was simply not good enough to support both types of conspiracy. The consequences should be strict and warranted a dismissal of the claim. The defendants had provided unchallenged evidence to show that the finding of an agreement to conspire could not reasonably be inferred. There was no reason not to accept the defendants' evidence as inherently probable that they had never met Thanabalan and never knew of him until the police report was made. It was implausible that they would have made a conspiratorial agreement with Thanabalan. In addition, another reason why the claim for conspiracy fell was because Thanabalan was undoubtedly not named as a defendant (see paras 32–33, 35, 37 & 42).

(2) On the plaintiffs' failure to plead fraud with particularity, such a claim as pleaded was devoid of any substance, lacking in precision, and obviously unsustainable as it lacked material facts. The adjuster's report based on Thanabalan's second police report and interview with Thanabalan was

hearsay evidence and was not substantive evidence of the facts asserted by the plaintiff that the first report was fraudulently made. Added to that, the alleged fraud was not reported to the police at all let alone a delayed report. The averment of fraud was short on substance, and ought to be construed as a bare allegation and not to be given any weight. The defendants' invocation of res judicata and/or issue estoppel was agreed with simply because, the issue of fraud as to whether Thanabalan's motorcycle was involved in the accident existed in the earlier proceedings in the sessions court. So too whether there was a conspiracy to defraud the plaintiff could not be challenged in these collateral proceedings. The justice of the case demanded that the SC judgment ought, in the interests of justice, to bar the plaintiff from relitigating the issue of fraud and/or conspiracy. Further, the rule in the case of *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668 applied as the plaintiff who was content to standby, and elected firstly not to intervene and second, to discharge solicitors for Thanabalan was bound by the result of the SC suit and the unequivocally clear finding of fact that Thanabalan was 100% liable for the accident. Res judicata in the wider sense ought to bar the SC judgment from being impeached. The plaintiff had failed to discharge its 'burden of proof' under ss 101 and 102 of the Evidence Act 1950 on the balance of probabilities and as such was not entitled to the relief sought (see paras 48, 52, 69, 71, 82, 84, 86 & 88–89).

[Bahasa Malaysia summary

Plaintif memohon injunksi terhadap defendan untuk melarang mereka daripada menguatkuasakan penghakiman yang diperoleh mereka ('penghakiman MS') di mahkamah sesyen ('saman MS') dan untuk pengisytiharan bahawa penghakiman MS adalah tidak teratur dan tidak boleh menjadi asas untuk memulakan apa-apa prosiding pelaksanaan, ganti rugi untuk penyalahgunaan proses, pendakwaan jahat, pengayaan tidak adil dan untuk tort ancaman pelaksanaan terhadap plaintif tanpa terlebih dahulu mendapatkan penghakiman terhadap plaintif. Plaintif adalah penanggung insurans dan telah mengeluarkan polisi untuk melindungi motosikal yang dimiliki oleh seorang Thanabalan a/l M Rajamanickam ('Thanabalan'). Defendan pertama dan kedua sebagai penunggang dan pemilik motosikal masing-masing telah memfailkan saman MS berhubung dakwaan kemalangan dengan motosikal Thanabalan ('kemalangan'). Defendan pertama mengalami pelbagai kecederaan termasuk lumpuh akibat kemalangan itu. Thanabalan telah membuat laporan polis ('laporan polis pertama') bahawa dia berlanggar dengan motosikal defendan kedua. Plaintif melantik adjuster untuk menyiasat kemalangan itu dan merekodkan kenyataan daripada Thanabalan. Adjuster melaporkan bahawa Thanabalan memaklumkan kepada adjuster bahawa motosikalnya tidak terlibat dalam kemalangan itu. Dua tahun selepas laporan polis pertamanya, Thanabalan membuat satu lagi laporan polis ('laporan polis

kedua') untuk menarik balik laporan polis pertama, menyatakan bahawa dia tidak terlibat dalam kemalangan itu dan selepas membuat laporan polis pertama, dia telah dibayar sejumlah RM600 oleh seorang lelaki India untuk membuat laporan polis pertama. Defendan pertama juga membuat dua laporan polis menyatakan dia menunggang motosikal yang terlibat dalam kemalangan dengan motosikal Thanabalan. Di Mahkamah Tinggi, plaintif memperoleh perintah pengisytiharan terhadap Thanabalan untuk mengisytiharkan polisi itu terbatal dan tidak boleh dikuatkuasakan. Setelah mendapat perintah pengisytiharan itu, plaintif mengarahkan peguamnya untuk melepaskan diri mereka daripada bertindak selanjutnya untuk Thanabalan di mahkamah sesyen. Defendan meneruskan kes mereka dan memperoleh penghakiman MS memihak kepada mereka dengan jumlah hampir RM4 juta di mana hakim mahkamah sesyen yang bijaksana memutuskan bahawa Thanabalan bertanggungjawab 100% atas kemalangan itu. Defendan menuntut daripada plaintif pembayaran jumlah penghakiman yang timbul daripada penghakiman MS. Plaintif kemudiannya memohon untuk campur tangan dan mengetepikan penghakiman MS dan juga memfailkan tindakan ini. Thanabalan membuat satu lagi laporan polis ('laporan polis ketiga') di mana dia menarik balik laporan polis kedua dan mendakwa bahawa dia telah dikelirukan untuk membuat laporan polis kedua kerana dia tidak mempunyai lesen memandu yang sah ketika kemalangan itu berlaku. Kes yang diplidkan plaintif dalam tindakan ini ialah defendan telah melakukan penipuan dengan membuat dua laporan palsu dan telah bersubahat dengan Thanabalan untuk membuat tuntutan palsu dan setelah mendapat penghakiman MS terhadap pihak diinsuranskan plaintif, kini mengancam untuk menguatkuasakan dan melaksanakan penghakiman terhadap plaintif. Defendan menafikan mereka telah bersubahat dengan Thanabalan untuk menipu plaintif dan berpendapat bahawa, antara lain, plaintif telah dihalang daripada mencabar penghakiman MS pada peringkat ini kerana plaintif menyedari sepenuhnya prosiding MS, mempunyai pengetahuan dan kawalan penuh terhadap pembelaan Thanabalan tetapi telah memilih untuk tidak mengemukakan kesnya untuk pertimbangan MS.

Diputuskan, menolak tuntutan dengan kos tertakluk kepada alokatur:

(1) Selain daripada mendakwa bahawa defendan telah bersubahat dengan Thanabalan untuk melakukan penipuan ke atas plaintif, plaintif telah gagal untuk memplid dalam pernyataan tuntutan bahawa terdapat perjanjian antara defendan dan Thanabalan; perjanjian itu adalah untuk tujuan mencederakan plaintif; dan perbuatan yang dilakukan dalam pelaksanaan perjanjian yang mengakibatkan kerugian kepada plaintif. Plaintif tidak dalam plidingnya menyatakan dengan jelas bentuk konspirasi yang mana kausa tindakannya dalam konspirasi yang dilemparkan terhadap defendan telah dibangkitkan. Memandangkan jenis konspirasi yang didakwa tidak jelas, pliding itu tidak cukup baik

untuk menyokong kedua-dua jenis konspirasi. Akibatnya harus tegas dan memerlukan penolakan tuntutan. Defendan telah memberikan keterangan yang tidak dicabar untuk menunjukkan bahawa penemuan perjanjian untuk bersubahat tidak boleh disimpulkan secara munasabah. Tidak ada sebab untuk tidak menerima keterangan defendan sebagai kemungkinan besar bahawa mereka tidak pernah bertemu Thanabalan dan tidak pernah mengenalinya sehingga laporan polis dibuat. Adalah tidak masuk akal bahawa mereka akan membuat perjanjian konspirasi dengan Thanabalan. Selain itu, satu lagi sebab mengapa tuntutan konspirasi gagal adalah kerana Thanabalan tidak dinamakan sebagai defendan (lihat perenggan 32–33, 35, 37 & 42).

(2) Mengenai kegagalan plaintif untuk memplid penipuan secara khusus, tuntutan seperti yang diplidkan adalah tidak mempunyai sebarang kebenaran, kurang ketepatan, dan jelas tidak dapat dipertahankan kerana ia tidak mempunyai fakta material. Laporan adjuster berdasarkan laporan polis kedua Thanabalan dan temu bual dengan Thanabalan adalah keterangan dengar cakap dan bukan keterangan fakta substantif yang ditegaskan oleh plaintif bahawa laporan pertama dibuat secara penipuan. Tambahan lagi, dakwaan penipuan itu langsung tidak dilaporkan kepada polis apatah lagi laporan yang tertangguh. Penegasan penipuan adalah singkat pada intinya, dan sepatutnya ditafsirkan sebagai dakwaan kosong dan tidak perlu diberi sebarang pertimbangan. Permohonan defendan terhadap res judicata dan/atau isu estoppel dipersetujui semata-mata kerana, isu penipuan sama ada motosikal Thanabalan terlibat dalam kemalangan itu wujud dalam prosiding awal di mahkamah sesyen. Begitu juga sama ada terdapat konspirasi untuk menipu plaintif tidak boleh dicabar dalam prosiding kolateral ini. Keadilan kes menuntut bahawa penghakiman MS sepatutnya, demi kepentingan keadilan, menghalang plaintif daripada membangkitkan semula isu penipuan dan/atau konspirasi. Selanjutnya, peraturan dalam kes *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668 terpakai kerana plaintif yang berpuas hati untuk bersedia, dan memilih pertama untuk tidak campur tangan dan kedua, untuk melepaskan peguam untuk Thanabalan adalah terikat dengan keputusan saman MS dan penemuan fakta yang jelas bahawa Thanabalan bertanggungjawab 100% atas kemalangan itu. Res judicata dalam pengertian yang lebih meluas sepatutnya menghalang penghakiman MS daripada dicabar. Plaintif telah gagal untuk melepaskan 'beban pembuktiannya' di bawah ss 101 dan 102 Akta Keterangan 1950 mengenai imbangan kebarangkalian dan oleh itu tidak berhak mendapat relif yang dipohon (lihat perenggan 48, 52, 69, 71, 82, 84, 86 & 88–89).]

Cases referred to

Adib bin Mokhtar & Ors v Jason Chan Chee Khong & Anor [1999] 2 MLJ 473, HC (refd)

AmGeneral Insurance Bhd v Iskandar bin Mohd Nuli [2016] 1 MLJ 818, CA (refd)

AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals [2022] 5 MLJ 825; [2022] 8 CLJ 175, FC (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Australian Wool Innovation Ltd v Newkirk [2005] FCA 290, FC (refd)

Bulyah bt Ishak & Anor (administrators for the estate of Nor Zainir bin Rahmat) v Ambank (M) Bhd (in liquidation) and another appeal [2018] 1 MLJ 484, CA (refd)

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd)

Chemfert Sdn Bhd & Anor v Lim Hua [2010] 5 MLJ 228; [2010] 7 CLJ 491, CA (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90, HC (refd)

Chuah Ah Chee & Ors v Gurdial Singh & Anor (Civil Suit No 351 of 1979), HC (refd)

City of London Group plc and another company v Lothbury Financial Services Ltd and others [2012] EWHC 3148 (Ch), Ch D (refd)

Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd [2016] 3 MLJ 122; [2015] 2 CLJ 1062, CA (refd)

Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61, FC (refd)

ECH Development & Management Sdn Bhd v Prabagaran a/l Perumal & Anor [2020] MLJU 516, CA (refd)

Floral Trends Limited v Li Onn Floral Enterprise (M) Sdn Bhd and Anor [2006] MLJU 339; [2006] 6 CLJ 525, HC (refd)

Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman & Ors [1996] 3 MLJ 259, HC (refd)

Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213; [1995] 2 CLJ 900, CA (refd)

Hong Leong MSIG Takaful Bhd (previously known as Hong Leong Tokio Marine Takaful Bhd) v Shantawood Manufacturing Sdn Bhd [2016] 6 MLJ 32, CA (refd)

Hu Chang Pee v Tan Sri Datuk Paduka (Dr) Ting Pek Khiing [1999] 3 MLJ 402, HC (refd)

Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd) [2018] 2 MLJ 292, FC (refd)

Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd [2017] 2 MLJ 697, FC (refd)

A *Jitweer Singh a/l Ojagar Singh v PP* [2016] 4 MLJ 525; [2017] 2 CLJ 561, CA (refd)
Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another appeal [2006] 1 SLR 112, CA (refd)
Mckellar and another v Container Terminal Management Services Ltd and
B *others* (1999) 165 ALR 409, FC (refd)
Mohamed Ismail bin Mohamed Shariff v Zain Azahari bin Zainal Abidin & Ors [2013] 2 MLJ 605, FC (refd)
Ng Ah Ba & Ors v Ramanda Sdn Bhd [1996] 1 MLJ 62, CA (refd)
Ng Kong Ling & Anor v Low Peck Lim & Ors [2017] 4 MLJ 21, FC (refd)
C *Paldraman Palaniappan & Ors v Lachemi Sanganayar* [1992] 4 CLJ 1870, HC (refd)
Peralta Eugenio Sarmiento v Compass Technology Co Ltd [2010] HKCA 70 (refd)
Pinson v Lloyds and National Provincial Foreign Bank, Limited [1941] 2 KB
D 72; [1941] 2 All ER 636, CA (refd)
Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394, CA (refd)
Repco (M) Sdn Bhd v Tan Toh Fatt & Ors [2013] 7 MLJ 408, HC (refd)
SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor [2011] 4 MLJ
E 393; [2010] 9 CLJ 389, CA (refd)
SP Chengalvaraya Naidu v Jagannathd 1994 AIR 853, SC (refd)
Satchithanantham v Zeaiter Corporate Holdings Pty Ltd [2011] NSWC 1609, SC (refd)
Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur &
F *Anor* [2016] 3 MLJ 1, FC (refd)
Singapore Finance Ltd v Lim Kah Ngam (S'pore) Pte Ltd & Eugene HL Chan Associates (third party) [1984] 2 MLJ 202 (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1, FC (refd)
Sivakumar Shanmugaratnam v Strasburger Enterprises (Properties) Pty
G *Ltd* [2004] NSWCA 229, CA (refd)
Soo Lip Hong v Tee Kim Huan [2006] 2 MLJ 49; [2005] 4 CLJ 119; [2005] 1 MLRA 801, CA (refd)
Syed Abu Bakar bin Ahmad v PP [1984] 2 MLJ 19, FC (refd)
Sykt Sebati Sdn Bhd v Pengarah Jabatan Perhutanan & Anor [2019] 2 MLJ 689,
H FC (refd)
Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697, HC (refd)
Tekital Sdn Bhd v Sarina bt Kamaludin & Ors [2012] 8 MLJ 734, HC (refd)
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals [1996] 2 MLJ 265, CA (refd)
I *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668, CA (folld)
Tung Kean Hin & Anor (as executor for the estate of Tung Leong Geok, deceased) v Yuen Heng Phong (as administrator for the estate of See Ngan Sang @ Lee Ngan Sang) [2019] 2 MLJ 334, CA (refd)

UN Pandey v Hotel Marco Polo Pte Ltd [1980] 1 MLJ 4 (refd)
Veheng Global Trades Sdn Bhd v AmGeneral Insurance Bhd (formerly known as Kurnia Insurance (M) Bhd) & Anor and another appeal [2019] 4 MLJ 581; [2017] 7 CLJ 715, FC (refd)
Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) [2013] UKSC 46; [2014] AC 160; [2013] 4 All ER 715; [2013] 3 WLR 299, SC (refd)
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (refd)
Wong Thin Yit v Mohamed Ali [1971] 2 MLJ 175, FC (refd)
Zulhasnimar bt Hassan Basri & Ors v Dr Kuppu Velumani P & Ors [2016] 3 MLJ 625, CA (refd)
Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors [2014] 2 MLJ 799, FC (refd)

Legislation referred to

Evidence Act 1950 ss 40, 44, 45, 73(1), 73A, 101, 102
Rules of Court 2012 O 18 rr 8, 12(1), 19(1)

R Kamalanathan (with Vinod Kamalanathan and Anis Amirah) (Vinod Kamalanathan & Assoc) for the plaintiff.
Teo Han Ley (Teo & Assoc) for the defendants.

Liza Chan J:

INTRODUCTION

[1] In this action, the plaintiff sought an injunction against the defendants to prohibit them from enforcing the judgment obtained by them on 28 September 2017 ('the SC judgment') in Sessions Court Johore Bahru Suit No JA-A53KJ-632–09 of 2016 ('the SC suit') and for declarations that the SC judgment is irregular and cannot be the basis to commence any execution proceedings, damages for: (i) abuse of process; (ii) malicious prosecution; (iii) unjust enrichment; and (iv) for the tort of threat of execution against the plaintiff without first obtaining a judgment against the plaintiff.

[2] After a full trial held over 22 days, I had dismissed the plaintiff's claim with costs.

[3] This judgment contains the full reasons for my decision.

BACKGROUND

[4] The plaintiff, an insurer listed on the main board of Bursa Malaysia had issued a policy to cover motorcycle No JQA 6107 owned by one Thanabalan

a/l M Rajamanickam ('Thanabalan') for the period 31 March 2014 to 31 March 2015.

[5] The first and second defendants as rider and owner respectively of motorcycle No PER 6664 had filed the SC suit in respect of an alleged accident with Thanabalan's motorcycle on 3 September 2014 ('the accident'). The first defendant suffered multiples injuries including being paralysed as a result of the accident. Thanabalan had lodged a police report on 16 September 2014 ('first police report') that he collided into the second defendant's motorcycle.

[6] The plaintiff appointed adjusters to investigate the accident and to record a statement from Thanabalan as to how the accident occurred upon receipt of notice of commencement of proceedings. The adjusters reported that Thanabalan informed the adjusters that his motorcycle was not involved in the 3 September 2014 accident.

[7] Two years after his first police report, on 14 November 2016, Thanabalan lodged a second police report to recant the first police report, stating that he was not involved in the accident and that after lodging the first police report, he was paid a sum of RM600 by one male Indian to make the first police report. This second police report was stated to be made on his own free will.

[8] The first defendant also lodged two police reports on 10 September 2015 stating that he was riding motorcycle No PER 6664 which was involved in the 3 September 2014 accident with Thanabalan's motorcycle No JQA 6107.

[9] On 25 January 2017, the plaintiff obtained against Thanabalan a declaratory order under Kuala Lumpur High Court Originating Summons No WA-24NCC-537–12 of 2016 to declare the policy void and unenforceable.

[10] Upon obtaining the declaratory order, the plaintiff instructed its solicitors to discharge themselves from further acting for Thanabalan in the sessions court.

[11] The defendants proceeded with their case and on 28 September 2017 obtained the SC judgment in their favour for a sum of almost RM4m, interest and costs. The learned sessions court judge ('SCJ') adjudged that Thanabalan was 100% liable for the accident on 3 September 2014.

[12] By letter dated 28 August 2020 received by the plaintiff on 2 September 2020, the defendants' solicitors demanded from the plaintiff payment of the

judgment sum, interest and costs of over RM4m arising from the SC judgment. The plaintiff then applied to intervene and to set aside the SC judgment in the sessions court and also filed the present action.

[13] Thanabalan made a third police report on 7 October 2020. In this third police report, he retracted the second police report and claimed that he was misled by Mr Rahimy to make the second police report because he did not have a valid driving licence when the accident happened.

THE PLAINTIFF'S CASE

[14] The plaintiff's pleaded case in this action is that the defendants have committed fraud by lodging two false reports on 10 September 2015 that he was riding motorcycle No PER 6664 which was involved in the 3 September 2014 accident with Thanabalan's motorcycle No JQA 6107 and have conspired with the plaintiff's insured, namely, Thanabalan to make a false claim and having obtained the SC judgment against the plaintiff's insured, are now threatening to enforce and execute the judgment against the plaintiff (see para 11 of statement of claim ('SOC') and reiterated at para 1(K) at p 10 of plaintiff's submission dated 20 December 2022). The particulars of conspiracy set out in para 6 of the SOC are:

(a) lodging police report dated 10 September 2015 at 14:19pm and admitting to a collision whilst allegedly riding motorcycle No PER 6664 with motorcycle No JQA 6107 on 3 September 2014 when the first defendant knew for a fact that there was no such accident at all;

(b) causing the insured to agree with a lawyer's tout named Balan to lodge a false police report to help the plaintiffs in the civil action to make a false claim;

(c) causing the insured to lodge a false police report ie Traffic Johor Bahru (S) 019095/14 dated 16 September 2014 and admitting to a collision with motorcycle No PER 6664 on 3 September 2014 whilst allegedly riding motorcycle No JQA 6107 when the insured knew for a fact that there was no such accident at all;

(d) after lodging the said false police report, receiving a sum of RM600 from the claimants/their agents/servants for agreeing to help the claimants to make a false claim against the plaintiff herein;

(e) lodging a false police report and stating details of the place of accident when the insured did not know for a fact the place of the alleged accident; and

(f) subsequently the insured lodging another police report ie report No JBS/021482/16 on 14 November 2016 and admitting in the said report to have made a false police report earlier.

THE DEFENDANTS' DEFENCE

[15] In defence of the claim, the defendants in a nutshell:

(a) denied they had conspired with Thanabalan to defraud the plaintiff; and

(b) contended:

(i) the plaintiff is estopped from challenging the SC judgment at this stage as the plaintiff was fully aware of the SC proceedings, had full knowledge and control of the defence of Thanabalan but had elected to walk away from putting its case for the SC's consideration;

(ii) the SC judgment was obtained after two witnesses had given unchallenged evidence; and

(iii) the proceedings herein are an abuse of court process as the plaintiff has filed various applications in the sessions court to intervene and set aside the SC judgment.

ANALYSIS AND FINDINGS

[16] As I see it, in order to determine whether the plaintiff is entitled to its prayers, it is plain that the crucial issues are whether or not the motorcycle belonging to Thanabalan was involved in the accident and whether the action herein is barred by res judicata in the wider sense.

Burden of proof

[17] The plaintiff bears the legal and evidential burden to prove on a balance of probabilities of establishing a case against the defendants throughout the trial. In the case of *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61, the Federal Court held:

> Sections 101, 102, 103 and 106 of the Evidence Act 1950 deal with the burden of proof. *Under s 101, it is provided that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. Under s 102 the burden of proof lies on that person who would fail if no evidence at all were given on either side.* Under s 103, the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Under s 106, when any fact is especially within the knowledge of any person the burden of proving that fact is upon him.

[18] The plaintiff, has both the 'burden of proof' to make out a prima facie case as well as the initial onus of proof to adduce evidence to prove the claim. The onus of proof would only shift to the defendants if the plaintiff had made

out a prima facie case. If the plaintiff had not discharged that burden and onus of proof, then the claim should be dismissed, regardless of whether the defence had or had not been made out. To succeed in this case, the plaintiff must prove on a balance of probabilities the fraud and/or conspiracy alleged to have been perpetrated by Thanabalan and the defendants, see *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1 at pp 17–18 (FC) and re-emphasised by the Federal Court in *Veheng Global Trades Sdn Bhd v AmGeneral Insurance Bhd (formerly known as Kurnia Insurance (M) Bhd) & Anor and another appeal* [2019] 4 MLJ 581; [2017] 7 CLJ 715.

[19] I would state that in arriving at my decision, I am fully conscious of what I have decided earlier and the case laws referred to in considering and dismissing the defendants' striking out application. I had then, inter alia, held that the plaintiff's case as pleaded is not so hopeless, baseless or without foundation in law or an abuse of the process of the court to be deserving of a striking out as the courts have on numerous occasions held that O 18 r 19(1) of the Rules of Court 2012 confers a discretion on the court to allow a plaintiff to amend. No amendments were made. This court is as such, strictly bound by the pleadings in deciding this case.

[20] A judge may, after expressing a view in the course of an interlocutory proceeding, quite properly hear the main action and come to a conclusion diametrically opposite to that expressed at the interlocutory level. In *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213 at p 220; [1995] 2 CLJ 900, Gopal Sri Ram held:

> In my judgment, *a judge may, after expressing a view in the course of an interlocutory proceeding, quite properly hear the main action and come to a conclusion diametrically opposite to that expressed at the interlocutory level*. Translated to a case such as the present, a judge may grant an interlocutory injunction because he finds a particular line of defence taken to be untenable and yet, after hearing all the evidence and detailed argument at the trial, reach the opposite conclusion and dismiss the suit. I cannot help but think that such an occurrence is commonplace in our courts as it is indeed in other jurisdictions.

[21] I now deal with the plaintiff's claims based on fraud as well as conspiracy to defraud to impeach the SC judgment.

Conspiracy to defraud?

[22] An allegation of conspiracy is equivalent to that of fraud: *Ng Ah Ba & Ors v Ramanda Sdn Bhd* [1996] 1 MLJ 62 (CA). As with fraud, it is a serious allegation and should not be lightly made: Hely J in *Australian Wool Innovation Ltd v Newkirk* [2005] FCA 290 said:

> [59] Like fraud, conspiracy is not an allegation that should lightly be made: *Hughes*

v Western Australian Cricket Assn Inc (1986) 69 ALR 660 at 700 (Toohey J).

[23] As such, it is trite that conspiracy (like fraud) must be strictly pleaded and each element of the tort must be fully particularised:

(a) in *Repco (M) Sdn Bhd v Tan Toh Fatt & Ors* [2013] 7 MLJ 408, it was held:

> [64] ... It is settled law that the assertion of conspiracy requires the *strictest pleading* and must be supported by full particulars. It is also settled law that parties are bound by their pleadings and shall not adduce any evidence for issues which had not been pleaded. It is trite that unless particulars of conspiracy are specifically pleaded, no evidence can be led on them (*YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621).

(b) in *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394, the Court of Appeal held that:

> [48] Just as fraud must be pleaded with great particularity, so must the constituent ingredients of the alleged conspiracy by TC Euro be pleaded.

(c) in *City of London Group plc and another company v Lothbury Financial Services Ltd and others* [2012] EWHC 3148 (Ch):

> [74] ... First of all, as is evident from David Richards J's judgment in *McKillen*, the particulars of claim must properly plead and particularise the necessary elements.

See also: *Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman & Ors* [1996] 3 MLJ 259 at p 269E and 269F; *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another appeal* [2006] 1 SLR 112 (CA) at para [30].

[24] The elements of the tort must be clearly pleaded:

(a) in *Renault*, the Court of Appeal allowed the appellants' appeal to strike out the claim and held four elements must be satisfied in a claim for conspiracy at the interlocutory stage:

> [32] In regard to the tort of conspiracy, the following need to be satisfied at this interlocutory stage:
>
> (a) an agreement between two or more persons (that is an agreement between Tan Chong and others);
>
> (b) an agreement for the purpose of injuring Inokom and Quasar;
>
> (c) the acts done in execution of that agreement resulted in damage to Inokom and Quasar; and
>
> (d) damage is an essential element and where damage is not pleaded the statement of claim may be struck out.

...

[34] It is trite law that the agreement to injure must come first (in other words the agreement should have crystallised), before the alleged unlawful acts are done in execution or pursuant to the agreement.

...

[42] There is no allegation of any overt acts carried out by TC Euro in the pleadings and by necessary implication TC Euro had not carried out any overt acts.

The gist of the tort of conspiracy is not the conspirational agreement alone but that agreement plus the overt acts causing damage (*Marrinam v Vibart* [1963] 1 QB 234 affirmed [1963] 1 QB 528).

Pleading. The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what was the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damages occasioned to the plaintiff thereby. (THE COMMON LAW LIBRARY — Number 5 — PRECEDENTS OF PLEADINGS — Section 26 — CONSPIRACY).

(b) the Hong Kong Court of Appeal in *Peralta Eugenio Sarmiento v Compass Technology Co Ltd* [2010] HKCA 70 at para [17] spelled out what the pleadings for conspiracy must contain:

As a matter of pleading, a case based on conspiracy, must contain the following elements:

The agreement between two or more persons. *The means of carrying out the agreement, whether lawful or unlawful, must be set out*.

The intention to injure the plaintiff, whether predominant (in the case of a lawful means conspiracy) or merely an intention to injure (in the case of an unlawful means conspiracy).

The acts that were carried out pursuant to the agreement and the stated intention.

The damage caused to the plaintiff.'

[25] It follows from *Peralta* that the distinction between lawful and unlawful means conspiracy must be set out in the pleadings.

[26] In lawful means conspiracy, a predominant purpose to injure must be alleged. In unlawful means conspiracy, an intention to injure suffices.

[27] This principle appears to have been accepted by Shankar J (as His

Lordship then was) in *Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman & Ors* [1996] 3 MLJ 259 at p 269E, 269F and see 269B where His Lordship held that the words predominant purpose must appear in the pleading:

> I think it can be fairly stated that, to establish the tort of conspiracy to injure the developer by lawful means, *it has to be pleaded that, in the filing of the motion, the predominant purpose of the defendants as conspirators was to injure the developer.*

[28] The intending plaintiff cannot merge the two types of conspiracies together in the pleading since there is a clear distinction between the two conspiracies. Otherwise, it will prove difficult for the defendants to answer to the allegations. Pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her.

[29] The type of conspiracy alleged must be in the body of the pleading and not in the particulars because particulars cannot enlarge a pleaded cause of action — *Sivakumar Shanmugaratnam v Strasburger Enterprises (Properties) Pty Ltd* [2004] NSWCA 229 at para [13].

[30] The proper function of particulars is not to state the material facts omitted from the statement of claim, in order, by filling the gaps, to make good an inherently bad pleading, however common that pernicious practice may have become — per Scott LJ in *Pinson v Lloyds and National Provincial Foreign Bank, Limited* [1941] 2 KB 72 at p 75; [1941] 2 All ER 636 at p 638.

[31] If the type of conspiracy is not clearly pleaded, the pleading is bad:

(a) *Mckellar and another v Container Terminal Management Services Ltd and others* (1999) 165 ALR 409 at para 191:

> [191] It is by no means clear which of those forms of conspiracy the applicants seek to plead at this point in their amended statement of claim, just as it is unclear throughout the entire pleading which form of conspiracy is being addressed. The applicants do not appear to have turned their minds to just what are the essential elements of each such cause of action. That failure is just one of a number of reasons why the conspiracies pleaded are embarrassing.

The pleading was struck out: at para 296.

(b) *Satchithanantham v Zeaiter Corporate Holdings Pty Ltd* [2011] NSWC 1609:

> [53] ... If it is a common law pleading of conspiracy, the pleading does not identify what is the precise agreement which constitutes the alleged conspiracy. Nor does it make clear whether the alleged conspiracy was one to

use lawful or unlawful means. The ASOC is embarrassing and should be struck out as against the first and second defendants.

[32] Here, other than alleging that the defendants had conspired with Thanabalan to commit fraud upon the plaintiff, the plaintiff has failed to plead in the statement of claim that there was an agreement between the defendants and Thanabalan; the agreement was for the purpose of injuring the plaintiff; and the acts done in the execution of the agreement which resulted in damage to the plaintiff. In my opinion, the pleading of the conspiracy claim here is additionally deficient in the following respects:

(a) it fails to identify clearly the object of the conspiracy;

(b) it fails to plead the primary facts on which the conclusion of combination is based;

(c) there is a complete obfuscation as to when, and where the agreement was hatched and the respective agreed roles of the conspirators in carrying out the agreement;

(d) it fails to plead how each conspirator has the requisite knowledge or intention to enter into the agreement; the overt acts which were carried out pursuant to the combination with the intention of injuring the plaintiff;

(e) assuming the overt acts are the pleaded conduct, further facts need to be pleaded so as to show how that particular conduct is capable of injuring the plaintiff; and

(f) failed to plead that the conspirators had the sole or predominant purpose of injuring the plaintiff.

[33] It is apposite to take note that the plaintiff did not in his pleadings specify with clarity which of those forms of conspiracy its cause of action in conspiracy levelled against the defendants is pitched on. This significant failure is embarrassing and the SOC ought to be struck out on this ground alone — *Satchithanantham* and *Mckellar and another v Container Terminal Management Services Ltd and others.*

[34] The need to plead a clear distinction between the two types of conspiracy was also accepted by Nallini Pathmanathan J (as Her Ladyship then was) in *Tekital Sdn Bhd v Sarina bt Kamaludin & Ors* [2012] 8 MLJ 734, where she said:

> [101] It is clear from the above exposition that *the category of tort pleaded must be clear*.

[35] In the instant case, as the pleaded type of conspiracy is unclear, in my

judgment, the pleading is simply not good enough to support both types of conspiracy. The consequences should be strict and warrants a dismissal of the claim.

[36] If I am wrong, on the basis that the SOC as it stands is not fundamentally defective to warrant a dismissal of the claim, I now deal with whether the plaintiff has established its claim on a balance of probabilities.

[37] Having trawled through the evidence, sans the evidence of the alleged tout and Thanabalan, there simply was no evidence to suggest that the defendants were in cahoots with Thanabalan to make a case. I find that the defendants have provided unchallenged evidence to show that the finding of an agreement to conspire could not reasonably be inferred. In this regard, both defendants struck me as simple persons, who despite intensive cross-examination were candid with their answers and their story stood the test of cross-examination. Bearing in mind their demeanour, testing their oral testimony against the contemporaneous documents and the pleadings, this court has no reason not to accept the defendants' evidence as inherently probable that they have never met Thanabalan and never knew of him until the police report was made in 2015. It is implausible that they would have made a conspiratorial agreement with Thanabalan. I am thus in no position to make the inferences as to when and where the conspiratorial agreement was hatched, what were the contents of the agreement, what were the role(s) of each of the defendants as co-conspirators in implementing the agreement and how they acting in cahoots intended to injure the plaintiff to support the claim of conspiracy.

[38] Not only that, faced with the defendants' oral testimony, although initially a claim based on the defendants conspiring with Thanabalan, at p 24 of the plaintiff's submission, the plaintiff changed narrative and morphed the conspiracy to become that of a conspiracy perpetuated through a tout. This cannot be condoned. Parties are bound by their pleadings.

[39] It is established law that parties are confined to their pleadings and courts are to decide on issues raised in them. The confinement of issues within the four corners of the pleadings, amongst others, help the court identify and adjudicate in an orderly fashion the matter before it, prevent surprises, and to inform parties in advance of the case they have to meet and thereafter deal with them accordingly. See the latest case on this subject, in *Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd)* [2018] 2 MLJ 292, where the Federal Court held:

> [27] It is settled law that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded: *Samuel Naik Siang Ting v*

Public Bank Bhd [2015] 6 MLJ 1, *State Government of Perak v Muniandy* [1986] 1 MLJ 490, *Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd* [2011] 2 MLJ 141; [2009] 6 CLJ 232. In *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 CLJ Rep 239 it was held that where a vital issue was not raised in the pleadings, it could not be allowed to be granted and to succeed on appeal. A decision based on an issue which was not raised by the parties in their pleadings is liable to be set aside: *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152. In the *Chartered Bank v Yong Chan* [1974] 1 MLJ 157, the Federal Court set aside the judgment of the trial judge as it was decided on an issue not raised on the pleadings. In that case the trial judge erred in concluding that the pleadings included a claim for breach of contract as well as a claim for libel.

[40] Specifically, the Federal Court in the case of *Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd* [2017] 2 MLJ 697 had held that:

> [60] It is a cardinal rule that parties are bound by their pleadings and are not allowed to adduce facts and submissions on matters which they had not pleaded. Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment (see: *State Government of Perak v Muniandy* [1986] 1 MLJ 490, *Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313 and *Blay v Pollard and Morris* [1930] 1 KB 628).

[41] At any rate, such a 'tout' was not produced before the court to drive home the charge of conspiracy. If I am wrong, that the plaintiff in fact has proven or that it may be inferred the agreement or combination between the conspirators plus the overt acts were carried out with a predominant purpose of injuring the plaintiff, damage must be pleaded and suffered. The plaintiff, in my respectful view cannot in its reply submission at p 18 say damages was pleaded at para 21 of the SOC as para 21 is the relief sought! Damages is an essential ingredient of the tort of conspiracy, see *Renault* at paras [32] and [42]. In *City of London Group plc and another company v Lothbury Financial Services Ltd and others* [2012] EWHC 3148 (Ch) it was held:

> [72] However, it is common ground that the tort of conspiracy requires proof of damage to complete the cause of action. A broad conventional allegation that by reason of the stated facts damage has been suffered is inadequate to prove the actual pecuniary loss required in a claim for conspiracy: *Lonrho v Fayed (No 5)* [1994] 1 All ER 188; [1993] 1 WLR 1489 at 1494 C-D and 1501H, [1993] NLJR 1571.

[42] Besides being unable to prove any element of the tort, another reason why the claim for conspiracy here falls is because Thanabalan was undoubtedly not named as a defendant. In *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393; [2010] 9 CLJ 389, the Court of Appeal dismissed the appeal because the alleged co-conspirators were not named as defendants in the court below and there was no explanation given for the non-inclusion of the alleged co-conspirators. The claim for conspiracy here falls for the reasons given.

Is there fraud to impeach the SC judgment?

[43] It is trite that a fresh action may be initiated to impeach and set aside an earlier judgment on the premise that the said judgment was entered into as a result of fraud or perjured evidence practiced upon the court. Section 44 of the Evidence Act 1950 provides that: 'Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under ss 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion'.

[44] In *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1, the Federal Court explained the application of s 44 of the Evidence Act as follows:

> [39] Our view is that the fraud of which s 44 of the Act speaks refers to an *actual fraud and not constructive fraud* ie *fraud practised by the other side must have prevented the respondents from placing their case before the court*.
>
> [40] The fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the decree by the contrivance (see *Patch v Word*).
>
> [41] The *earlier judgment cannot be impeached or set aside on a mere general allegation of fraud. It must be shown with sufficient details how, when, where and in what way the alleged fraud was committed*.

[45] In *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346, at pp 360–361, the Court of Appeal said that a judgment may be impeached for deliberate fraud practised upon the court, and it is insufficient to show that a litigant merely convinced the court through misleading or erroneous evidence after citing, amongst others, an enlightening passage from the Indian Supreme Court case of *SP Chengalvaraya Naidu v Jagannathd* 1994 AIR 853, which reads:

> ... The position would be entirely different if a party litigant could establish that in a prior litigation his opponent prevented him by an independent, collateral wrongful act such as keeping his witnesses in wrongful or secret confinement, stealing his documents to prevent him from adducing any evidence, conducting his case by tricks and misrepresentation resulting in his misleading of the court.

[46] It is trite law that fraud must be specifically pleaded by the party alleging the same, see O 18 r 8 and O 18 r 12(1) of the Rules of Court 2012. O 18 r 12(1) reads:

> Subject to paragraph (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words —

(a) particulars of any misrepresentation, *fraud*, breach of trust, wilful default or undue influence on which the party pleading relies; ... A

[47] See also:

(a) *Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors* [2014] 2 MLJ 799 where the Federal Court in a judgment delivered by Jeffrey Tan FCJ said: B

> [24] ... In relation to pleadings in general, the rules of court require a pleading of fraud to contain particulars of the fraud on which the party pleading relies (see O 18 r 12(1)(a) of the Rules of the High Court 1980, now Rules of Court 2012). 'When fraud is alleged it must be specifically pleaded. The mere allegation of fraud without showing facts to support it is not a matter to which the court will pay serious attention (*Wallingford v Mutual Society and Official Liquidator* (1880) 5 App Cas 685 at p 697. The party need not use the word 'fraud' if he pleads, in unambiguous language, acts which amount in law to fraud (*Myddleton v Lord Kenyon* (1794) 2 Ves 391 at p 412). Whenever fraud or misrepresentation is alleged in a pleading, or any affidavit, full particulars of the alleged fraud or misrepresentation must be given' (*Spenser Bower, Turner and Handley, Actionable Misrepresentation* (4th Ed), at pp 384–385). C D E
>
> [25] In *Wong Yew Kwan v Wong Yu Ke & Anor* [2009] 2 MLJ 672, Gopal Sri Ram JCA, as he then was, summarised the law as follows: The defendant alleged that the transfer to the plaintiffs by their father was by way of fraud, but no particulars were pleaded in the statement of defence or the counterclaim, *it is trite law that particulars of fraud must not only be pleaded, but must be specifically pleaded.* In the High Court case of *Malayan Banking Bhd v Lim Tee Yong & Ors* [1994] 3 MLJ 715; [1994] 4 CLJ 558 it was held by the High Court that *it is established law that the expression fraud cannot be generally or vaguely pleaded*. In *Lee Kim Luang v Lee Shiah Yee* [1988] 1 MLJ 193; [1988] 1 CLJ 619; [1988] 1 CLJ Rep 717 the High Court held that a general allegation of fraud is insufficient event to amount to averment of fraud. There is good reason why fraud must be specifically pleaded and required in O 18 r 8(1) of the RHC. It is not to take the other party by surprise. In fact, Lord Dening MR in *Associated Leisure Ltd (Phonographic Equipment Co Ltd) and others v Associated Newspapers Ltd* [1970] 2 QB 450 at p 677 said that 'it is the duty of the counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it'. F G H
>
> [26] The reason for fraud to be pleaded with particulars is because 'the word 'fraud' does not mean anything more than what is stated. When you plead fraud, the particulars must be pleaded ... mere general allegations of fraud are insufficient to constitute a pleaded case of fraud' (*Tenaga Nasional Bhd v Irham Niaga Sdn Bhd & Anor* [2011] 1 MLJ 752 per Abdul Malik Ishak JCA): I
>
> > When fraud, deliberate concealment or mistake is relied upon as postponing the limitation period, it must be sufficiently alleged in the

> pleading to bring the case within the appropriate statutory provision (*Halsbury's Laws of England*, (5th Ed), Vol 68 para 948; see also Halsbury's Laws of Malaysia 2006 Reissue Vol 21 para 510.041). He must clearly state how he was kept from knowledge ... (*Babu Das Narani Singh v Muhammad Yusof* (1921) 41 IC 823). It is necessary that there must be something said or done which was directly introduced to keep the plaintiff from knowledge of his right to sue or apply. This is the interpretation of the old s 18 of the Limitation Act 1908 which is now s 17 with modifications (*The Limitation Act* by MR Mallick at p 306).

(b) the Court of Appeal in the case of *Tung Kean Hin & Anor (as executor for the estate of Tung Leong Geok, deceased) v Yuen Heng Phong (as administrator for the estate of See Ngan Sang @ Lee Ngan Sang)* [2019] 2 MLJ 334 at 352 held:

> [48] It is trite law that particulars of fraud must not only be pleaded, but must be specifically pleaded. *Fraud must be specifically pleaded so that the other party will not be taken by surprise and will know precisely the accusation against him*. Lord Denning MR in *Associated Leisure Ltd (Phonographic Equipment Ltd) v Associated Newspapers Ltd* [1970] 2 QB 450 said that:
>
> > it is the duty of the counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it.
>
> [49] *A general allegation of fraud is insufficient to mount the averment of fraud*. In our judgment, para 28 of the statement of claim as pleaded is clearly insufficient on the issue of forgery and/or fraud. Unfortunately, the issue of lack of particulars in the pleadings was not addressed and considered by the learned judicial commissioner in his grounds of judgment. *The non-particularisation of the allegation of fraud by the plaintiff in this case was clearly fatal*. (Emphasis added)

[48] Fraud is a serious allegation. On the plaintiffs' failure to plead fraud with particularity, I hold that such a claim as pleaded is devoid of any substance, lacking in precision, and obviously unsustainable as it lacks material facts. As to what constitutes 'material facts' was explained in the case of *Adib bin Mokhtar & Ors v Jason Chan Chee Khong & Anor* [1999] 2 MLJ 473 at p 477 in the judgment of Clement Skinner JC (as he then was) as follows:

> In *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at p 712, Scott LJ said:
>
> > ... *The word 'material' means necessary for the purpose of formulating a complete cause of action; and if any one 'material' fact is omitted, the statement of claim is bad* ...
>
> It should hardly need stating then that the basic purpose of O 18 r 7(1) is to enable a defendant to know what it is that a plaintiff alleges against him and in doing so, the plaintiff is obliged to state facts sufficient to formulate a complete cause of action.

[49] Paragraph 6 of the SOC only sets out the existence of fraud and/or conspiracy to defraud in general terms with a remarkable absence of the requisite particulars for these causes of action. A

[50] Even if I am wrong, the evidence adduced by the plaintiff do not support a claim of fraud. B

[51] The second police report although in the agreed bundle was obviously on the assumption that Thanabalan would appear at the trial to testify, it exonerates Thanabalan of blame from the accident. It is to be noted that this second police report was made two years after the accident. It was not made contemporaneously. Such a report that is 'wholly exculpatory of the maker, then it is pure hearsay and inadmissible', see *Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175; *Chuah Ah Chee & Ors v Gurdial Singh & Anor* (Civil Suit No 351 of 1979), High Court, Penang). C D

[52] Knowing full well that Sargeant Ashienty was the investigating officer, it is fascinating that Rahimy bin Ramly would take Thanabalan to a different police station to make the second police report. In my view, the adjuster's report based on Thanabalan's second police report and interview with Thanabalan is hearsay evidence and was not substantive evidence of the facts asserted by the plaintiff that the first report is fraudulently made. If Thanabalan had testified on oath, both the second police report and the adjuster's report could have been used for purposes of cross-examination by the defendants. This court is entitled to ask the unpalatable question that surely the making of a police report cannot in itself be the truth of the allegations therein. E F

[53] Which then leaves only the video recording made by Rahimy. This court has admitted and marked the recording he tendered as an exhibit. In estimating the weight, if any, to be attached to it, regard shall be had to the totality of the evidence tendered at trial, and having done so, I am of the utmost respectful view that the recording is of low probative value and to be attributed little weight. Rahimy's interview being so pertinent on which the adjuster's report was based, was remarkably not recorded. I find that if he could record Thanabalan in the act of reading out the second police report, there is no reason why he did not record what he told, or explained or how he 'persuaded' Thanabalan to make the second police report. G H

[54] Bearing in mind that it is significant to establish whether the video recording has been tampered with, and further noting that both parties' experts could not determine if the recording was tampered with without examining the original, it is most telling that the Samsung handphone which Rahimy used to make the recording, though alleged to be broken, was not produced as evidence; neither was there evidence that attempts were made to have the I

phone examined by forensic experts as to whether the original recording can be extracted. This is eye-brow raising to say the least, for the plaintiff well knew that the recording made by Rahimy would be a sore bone of contention. More so when both experts testified the original source of the video is crucial in determining whether there was any tampering to the original file. I will come to this in a while.

[55] Both plaintiff and defendants called an expert witness each to enlighten the court on the technical aspects of the recording. On this note, I bear in mind the observations made by Federal Court in *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19 where Abdul Hamid FCJ (as he then was) held as follows at pp 23–24:

> It settled principle that while it is true that a judge who sits alone is entitled to weigh all the evidence, to put his own magnifying glass to determine the probabilities so to speak and form his own opinion or judgment, it would be erroneous for him to form a conclusion on a matter which could only be properly concluded with the aid for expert evidence.

[56] In this case, both expert witnesses had the necessary credentials but the expert opinions are in conflict with one another as to whether or not the recording has been tampered with thus obliging this court to assess their evidence in forming this court's decision, see: *Mohamed Ismail bin Mohamed Shariff v Zain Azahari bin Zainal Abidin & Ors* [2013] 2 MLJ 605 and *Zulhasnimar bt Hassan Basri & Ors v Dr Kuppu Velumani P & Ors* [2016] 3 MLJ 625 (CA). In *Jitweer Singh a/l Ojagar Singh v Public Prosecutor* [2016] 4 MLJ 525; [2017] 2 CLJ 561, Harmindar Singh Dhaliwal JCA (as he then was) set out the approach that ought to be taken by court in relation to conflicting expert evidence as follows:

> [43] It is trite law that a judge must not consider expert evidence in a vacuum in the sense that the same should not be artificially separated from the rest of the evidence. *When there is conflicting expert opinion, a judge should test it against the background of all the other evidence available in that particular case in order to decide which expert evidence is to be preferred*. In particular, a judge must have regard to the direct evidence, whether in the form of oral evidence or contemporaneous documents, and the *overall circumstances material* to the issue at hand. *The version more consistent with these oughts to be accepted as being more trustworthy and reliable*. (Emphasis added.)

[57] In supporting the plaintiff's case, its expert witness PW6, Samir Datt, from India with a Bachelor of Science in Engineering, Post Graduate in Business (said to have expertise in mobile forensic, data analysis and digital investigations) testified that the process of acquisition of a video file is a crucial process to validate whether a video file is genuine and not tampered with. But he cannot comment on the possibility of the video file had been edited before

it was sent through WhatsApp. He used four tools to analyse the video recording Masai mp4 ie VLC, Amped Authenticate, Encase Forensic & Amped Five. He testified that after performing analysis by using the tools Amped Five, Amped Authenticate and Encase Forensic, the software will generate a report on the analysis results or processing steps and the scientific methodology *BUT NONE* of these reports were produced to this court. He was only asked whether there was a pause in the video and to determine whether the video has been tampered with up to the interruption point and he made a conclusion that the video was not tampered with.

[58] The defendant's expert, DW1, Akash Rosen a/l Ram Kalaish testified that he was given a video file by the name of Masai.mp4. He was instructed on 30 August 2021 to conduct a Digital Forensic Investigation (analyse and verify the video). Two reports were prepared by the defendants' expert — 2 September 2021 (encl 258 — mp4 version — final interim report) and 14 September 2021 (encl 295 — CD). He testified both version of video in the Masai mp4 and CD content are the same. He testified that the audio does not sync with the video at 0.55, frame 1650, the lips of the man speaking in the video is out of sync and does not correspond with the audio; the Masai mp4 video 'is Truncated' due to various possibilities — the file was not fully copied or transmitted, file has not expected size from beginning of the frame to the end, file has been corrupted, file has been edited or tampered, a video file that's damage video during editing of video before uploading into whatsapp communication media d was damaged. The audio stream in Masai mp4 suddenly stopped at around 2.06 min as it was not a complete audio conversation; it is showing as part of a conversation instead of a fuly recorded conversation, it is also possible that other part of the audio stream conversation was placed at this video stream; and validation of any Whatsapp video file should be directly from the mobile where the Whatsapp video was created. He concluded that:

(a) any digital file can be easily modified, tampered with. Therefore, the process of acquiring the digital evidence from the source must follow the forensic process to ensure the authenticity of the recording;

(b) there is a possibility that the original video has been resized and changed before it was transferred since it could be that the video was not fully transmitted, corrupted or had been edited; and

(c) it cannot be identified if there was a tampering just before the video was uploaded to WhatsApp.

[59] Both expert witnesses however agreed that examining the original source of the video is crucial in determining whether there was any tampering to the original file.

[60] I find it strange that PW6 could conclude that the video file he was given is not tampered with and yet at the same time agreed that it is crucial to examine the original source in order to determine whether the original file has been tampered with. It is trite that an expert witness testifying pursuant to s 45 of the Evidence Act 1950 must be independent.

[61] I instead, prefer the testimony of DW1 who in my view was more measured in his explanation despite brutal cross-examination. He has an impressive curriculum vitae, well qualified and experienced in the field of forensic digital investigation. He holds a Master's degree in computer science, an accredited hacking and forensic investigator ('CHFI') and an associate member of the Institute of Certified Forensic Accountants ('CFA'). PW4 had testified in numerous court cases as a digital forensic expert, provided training and even given talks to members of the Bar Council in Kuala Lumpur and Penang on the fundamentals of digital forensic evidence and had also given talks to the Management Science University in Shah Alam on digital forensic. I find his curriculum vitae is impressive. PW6's qualifications do not bear on forensic digital investigation, neither was he accredited. Added to that, my other reasons are:

(a) Rahimy who did the recording agreed that he has no proof that the voice, the audio, belongs to the same video (NP 651 lines 20–25);

(b) PW6 agreed that the lips of the person speaking do not synchronise with the video stream;

(c) the reports from the tools mentioned and used by PW6 in conducting the analysis was obviously pertinent to support his evidence but these were not produced to the court. The plaintiff's learned counsels claimed that the reason these reports from the tools were not generated and produced to the court was because it was too technical for the expert to explain. With respect, I do not accept this reason. The basis of PW6's expert opinion ought to be made available for the court and for the defendants' expert to examine, regardless how 'technical' or complicated the data could be. To me, such an explanation does not hold water as an expert should have the ability to explain in layman's term to enlighten the court. PW6's inability to explain and non-production of the reports on software analysis amounts to incomplete evidence; and

(d) another reason for DW1's evidence to be preferred is that it is not disputed that the video file 'Masai.mp4' is not the first and original video. DW1 as a digital forensic investigator and digital video forensic analyst paid close attention to the protocol and followed it diligently. He conducted the analysis based on ISO 27037 standard, to ensure integrity of the information, preservation of digital evidence known as RSA Security MD5 (see report at p 18 of encl 258). His evidence is non-partisan, and he was not over eager to conclude there is tampering in

the 'Masai.mp4' video without seeing the original video. Both experts saw that the lip of the person speaking does not synchronize with the video as did this court when the video was played; and

(e) PW6 did not understand Bahasa Malaysia. It is inconceivable that he can identify that the person in the video is saying the same words as he speaks when PW6 has already agreed that the lip of the person speaking does not synchronise with the video stream.

[62] When there is conflicting expert testimony, it is well established that the court has the right to prefer one opinion to the other, see *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265 (CA). In *Singapore Finance Ltd v Lim Kah Ngam (S'pore) Pte Ltd & Eugene HL Chan Associates (third party)* [1984] 2 MLJ 202, Lai Kew Chai J said that his approach in evaluating the conflicting experts' evidence is to examine the scientific grounds and bases on which they rely.

[63] From evaluation of the evidence adduced in totality, I accept the explanation of DW1 over that of PW6. I therefore cannot accept the video recording which irrefragably was not an original as affording sufficient proof of fraud that Thanabalan was not involved in the accident. It was not a full video as testified by DW1. To rely on this video would be wrong in law. At any rate, owing to Thanabalan's third police report, the video lost its importance as Thanabalan was not called to testify.

[64] The plaintiff also relied on the proviso to s 73(1) of the Evidence Act 1950 in order to admit Thanabalan's police reports as evidence. The section reads:

73A Admissibility of documentary evidence in civil cases, etc.

(1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:

(a) if the maker of the statement either —

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

[65] I do not find the exceptions to the hearsay rule contained in s 73A applicable for just as in *Hong Leong MSIG Takaful Bhd (previously known as Hong Leong Tokio Marine Takaful Bhd) v Shantawood Manufacturing Sdn Bhd* [2016] 6 MLJ 32, there is no documentary evidence here that all reasonable efforts to find Thanabalan had been made but without success. Rahimy did not produce any evidence that he conducted NRIC, JPJ, EPF, SOCSO, Telco searches. There is also no evidence of any search done with the Immigration Department as to whether Thanabalan is overseas, and with the National Registration Department as to whether Thanabalan is dead or alive; or in this modern age, with Facebook and other social platform searches.

[66] Not only that, the address of 11, Jalan Angsana 7, Taman Perling 81700 Masai, where Rahimy tried to serve the subpoena was confirmed by DW5 not to exist as Taman Perling is not in Masai. The subpoena at encl 186 in fact gives an address of Bandar Seri Alam.

[67] Even if the adjuster's report is admissible, I will give it little weight as evidence was led by the defendants to show that Rahimy in his investigations, did not go to scene of the accident, did not interview the alleged 'Balan' who was to have paid Thanabalan RM600 to lodge the first police report. Rahimy did not inspect the two motorcycles to see if the damage was consistent with the first defendant's account of the accident. Nor did Rahimy speak with Sgt Ashienty, the investigating officer.

[68] Thanabalan would be able to provide the best evidence for the plaintiff in respect of the accident. The burden lies on the plaintiff to call Thanabalan to testify on its behalf. Sgt Ashienty was also not called to give evidence. It is with utmost respect, my finding that it is not for the defendants to produce Sgt Ashienty as it is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. This is in line with ss 101 and 102 of the Evidence Act 1950. Where a party on whom the burden of proof lies, has discharged it, then the evidential burden shifts to the other party, see *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4. When the burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of the different methods — *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697 (HC).

[69] Added to that, the alleged fraud was not reported to the police at all let alone a delayed report. In *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155 the Court of Appeal held at p 292 (MLJ):

> ... failure of the appellant to timeously lodge a report with the police ... at the earliest opportunity ... leaves us in no doubt, as it did the learned judge, that the tale was an afterthought, the machinations of a desperate litigant trying every trick in the book to escape judgment being entered against him.

[70] See also:

(a) *Floral Trends Limited v Li Onn Floral Enterprise (M) Sdn Bhd and Anor* [2006] MLJU 339; [2006] 6 CLJ 525 and *Paldraman Palaniappan & Ors v Lachemi Sanganayar* [1992] 4 CLJ 1870 which held that without a police report, the allegation of forgery must be construed as a bare allegation; and

(b) *Soo Lip Hong v Tee Kim Huan* [2006] 2 MLJ 49; [2005] 4 CLJ 119; [2005] 1 MLRA 801, where the Court of Appeal held that the absence of a contemporaneous police report when duress was alleged did little to support such a claim. Mohd Ghazali Yusoff JCA (as he then was) said:

> There was also no evidence of any police report or similar thing alike to suggest that PW1 was attempting to cheat DW1. In the absence of such evidence, the only irresistible factual inference I could draw would be for purpose(s) of purchasing the relevant property by PW1 from DW1 as agreed by both parties as evidenced by P1.

[71] There is no reason why the above principle should not apply to fraud. This omission to make a police report is the undoing of the allegation of fraud. Accordingly, I find the averment of fraud short on substance, and ought to be construed as a bare allegation and not to be given any weight.

[72] As for the plaintiff's contention that the defendants have made 'judicial admission' by their consent or inactivity to the discharge application filed by Messrs SK Lee, I reject this argument as I fear that the plaintiff may have misunderstood the term 'judicial admission'. In *Hu Chang Pee v Tan Sri Datuk Paduka (Dr) Ting Pek Khiing* [1999] 3 MLJ 402, Hasan JC, explained:

> The learned authors in *The Law of Evidence* by Ratanlai and Dhirajlal (17 Ed, 1987) made the following comments relating to s 17 of the Evidence Act at p 53:
>
> > Admissions may be oral or contained in documents, eg letter, depositions, affidavits, plaints, written statements, deeds, receipts, horoscopes. Admissions in pleadings are judicial admissions. They can be made the foundation of rights.

[73] In any case, it is my judgment that the matter of the discharge of Messrs SK Lee by the plaintiff in the SC proceedings ought not to be conflated with an alleged admission of fraud being committed by Thanabalan and/or the defendants.

[74] I have weighed the evidence of Ms Shoba Manickam ('PW3'), the Claims Manager of the plaintiff who testified amongst others that the plaintiff had instructed Messrs SK Lee to file the defence dated 18 November 2016; she agreed that the plaintiff had full control and chose to walk away in the sessions court by discharging Messrs SK Lee from representing Thanabalan. She gave the reason that the continuation of defending Thanabalan could be construed as a waiver of rights obtained pursuant to the declaratory order; the defendants were not named in the originating summons filed in the Kuala Lumpur High Court to obtain the declaratory order despite being aware of the defendants; acknowledged that the declaratory order was only effective between the plaintiff and Thanabalan; agreed that no police report was made against the defendants and Thanabalan; the plaintiff did not sue Thanabalan; the plaintiff is alleging that the defendants conspired to defraud the plaintiff and her entire evidence is based on the adjusters' report and the second police report made by Thanabalan.

[75] It is amply clear to me that the plaintiff's evidence on the point of fraud and conspiracy was purely based on the assumption that Thanabalan's second police report is the gospel truth. Failure to prove that must mean the action fails *in limine*.

[76] In deciding this action, I state for the record that I accept the evidence of the defendants. Their evidence will have to prevail over the reports lodged by Thanablan which I assign little probative value as well as the evidence of the plaintiff's witnesses who had no personal knowledge of the facts surrounding the accident. As such, less weight is given to the testimony of the plaintiff's witnesses. See *Bulyah bt Ishak & Anor (administrators for the estate of Nor Zainir bin Rahmat) v Ambank (M) Bhd (in liquidation) and another appeal* [2018] 1 MLJ 484 (CA):

> [31] As SD1 has no personal knowledge pertaining to the facts surrounding the sale and purchase of the property and/or the execution of exhs P2 and P3, having come to the scene many years after exhs P1, P2 and P3 were executed and had no documents with him, he would not be in the position to offer evidence to the contrary to disprove the plaintiffs' case.

[77] I have also considered learned counsel for the plaintiff's submissions that upon obtaining the said declaratory order, the plaintiff instructed its solicitors SK Lee to discharge themselves from further acting for their insured, Thanabalan at the Sessions Court at Johor Bahru because any continued

defence of the insured would be construed as a waiver of the rights obtained by the insurers pursuant to the declaratory order. It is only after the latest decision of the Court of Appeal in *AmGeneral Insurance Bhd v Iskandar bin Mohd Nuli* [2016] 1 MLJ 818 which held that notwithstanding the fact that the insurer had obtained a declaratory order, the insurer can continue to defend the insured and rider in order to mitigate both on liability and quantum since there is a commonality of interest for the insurer and the insured to work together, that the insurers now continue to act for their insured even though they have obtained a declaratory order.

[78] The defendants' learned counsel on the other hand had submitted that the fraud alleged by the plaintiff did not prevent the plaintiff from placing its case in the previous court proceedings:

(a) it is beyond dispute that the plaintiff that they had discharged its solicitors, Messrs SK Lee from representing Thanabalan in the sessions court when the proceedings were still alive;

(b) the allegation of fraud was already pleaded in the defence dated 18 November 2016 filed by Messrs SK Lee on behalf of Thanabalan as such, this is not the case that the defendants had concealed the 'fraud' from the plaintiff or the evidence of 'fraud' could not be discovered when the proceedings in the sessions court were still ongoing, to enable the plaintiff to impeach the SC judgment at this stage;

(c) the reliance on *AmGeneral Insurance Bhd v Iskandar bin Mohd Nuli* to justify its walk away from the SC proceedings is merely an afterthought because Messrs SK Lee was only discharged on 14 March 2017, 15 months after the decision of *Iskandar Mohd Nuli* was pronounced on 16 December 2015;

(d) the plaintiff could have applied to intervene in the SC proceedings while the proceedings were on foot but did not;

(e) the plaintiff being fully aware of the said sessions court proceedings at the material time, had made an election not to participate in the said sessions court proceeding, is now estopped from challenging the SC judgment; res judicata applies as the SC judgment was given after considering unchallenged evidence, citing in support the case of *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122; [2015] 2 CLJ 1062 where the Court of Appeal held as follows:

> [25] In the present appeal, since the present action would undoubtedly involve going over precisely the same facts as in the previous HTF suit, and accepting the broader approach and the wider sense of res judicata as the preferred and correct legal position, the fact that the parties to this suit are different from the HTF suit does not disentitle the appellant to invoke the doctrine of issue estoppel to bar the respondent from relitigating a specific

issue that had been decided in the prior separate action. *The doctrine also applies to a non-party. It is therefore not necessary for parties to be the same in both actions*. What the doctrine seeks to prevent is an abuse of the process of the court by attempting to make a double claim as well as allowing the plaintiff to relitigate its cause for the same relief and based on the same subject matter for which judgment had successfully been obtained in the HTF suit and to produce the same set of facts, the same witnesses and the same documents (see *Seruan Gemilang Makmur Sdn Bhd v Badan Perhubungan UMNO Negeri Pahang Darul Makmur*).

[79] In the sessions court, the learned SC judge made a finding of fact that Thanabalan was 100% negligent in the said accident and that the defendants were not negligent (p 51 encl 150). Being privy to the SC proceedings, I am of the respectful view that the plaintiff here is bound by that finding of fact. The term 'privies' include parties who have an interest in the subject of the litigation, see Edgar Joseph Jr J (as he then was) in *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 at p 95:

> ... By definition, *privies include* any person who succeeds to the rights or liabilities of the party upon his death ... or insolvency ... or who is otherwise identified with his or her estate or interest ... but it is *essential that he who is later to be held estopped must have had some kind of interest in the previous litigation or its subject matter* (per Lord Reid in *Carl-Zeiss Stiftung v Rayner and Keeler Ltd* [1966] 2 All ER 536 (HL) at p 550). (Emphasis added)

See also:

(a) in *Ng Kong Ling & Anor v Low Peck Lim & Ors* [2017] 4 MLJ 21, the Federal Court pronounced:

> [39] As rightly submitted by learned counsel for the appellants, *this rule extends to cover a person who is in privity with the parties, a 'privy' as he is called*, who is bound equally with the parties, in which case he is estopped by res judicata. The other exception is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct. This conduct sometimes consists of active participation in the previous proceedings (see *Nana Ofori Atta II, Omanhene of Akyem Abuakwa v Nana Abu Bonsra II as Adansehene and as Representing Stool of Adanse* [1958] AC 95 followed by *Re Thien Kon Thai* [2008] 6 MLJ 278).

(b) *ECH Development & Management Sdn Bhd v Prabagaran a/l Perumal & Anor* [2020] MLJU 516, the Court of Appeal explained:

> [113] The doctrine of res judicata is a *flexible doctrine* to be applied to a factual matrix to prevent injustice and *to bring finality to matters which the court has already decided*, either between the same parties or *even to a non-party if the underlying factual substratum is the same*. No further litigation is allowed on the ground that the issue is already res in that the court has already decided on it.

[80] In *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668, Gopal Sri Ram JCA (as he then was) held at p 674:

> I think that there is merit in the submission made on behalf of the first respondent. The applicant admittedly did not wish to face an order for costs. Nevertheless, while enjoying that protection, it attacked the first respondent's arguments before the judge ... *He was not prepared to take on all the risks of a full battle and, when the event went against him, decided to change his role. Ought he to be permitted to do this? I think not: for both principle and authority are against him.*
>
> In *Nana Ofori Atta II v Nana Abu Bonsra II* [1958] AC 95; [1957] 3 All ER 559; [1957] 3 WLR 830 the appellant claimed certain lands belonging to the respondent. Both were chieftains in what was then known as the Gold Coast, now Ghana. Some 16 years earlier, a chieftain subordinate to the appellant had laid claim to the same lands. *That action had been decided in the respondent's favour. The appellant, who was the person really interested in those lands, had knowingly stood by while the earlier action was fought out*. The Privy Council when affirming the decisions of the court below dismissing the appellant's claim, applied the principle formulated by Lord Penzance in *Wytcherley v Andrews* (1871) LR 2 P & D 327 at p 328 and stated in the following terms:
>
> > *There is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to reopen the case.* That principle is founded on justice and common sense, and is acted upon in courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the court that everything has been done bona fide in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be reopened.
>
> Although those words were spoken in the context of a probate action concerning a will, the Privy Council considered it to be of universal application.

[81] The rule in *Tradium* is that he who has an interest in a proceeding, while being aware of the proceeding and of the fact that somebody thereto is acting in a way that affects his interest, if he was content to stand by and see his battle fought, he should be bound by the result of that proceeding, and not be allowed to reopen the matter.

[82] In this action:

(a) the plaintiff who had knowledge and control of Thanabalan's defence had already raised the fraud issue as his defence in the sessions court;

(b) despite such knowledge, the plaintiff chose not to intervene in the SC case; and

(c) as the insurer of Thanabalan's motorcycle, the plaintiff had solicitors on record to advise it but deliberately chose to discharge Messrs SK Lee from the case.

[83] In the present action, the plaintiff alleged fraud and/or conspiracy to defraud was committed against it as Thanabalan's motorcycle was never involved in the accident. The matters complained of here emanated from the same accident and facts. In finding Thanabalan to be 100% liable for the accident, the rejection of the defence that Thanabalan's motorcycle was not involved in the accident must necessarily be part of the ratio of the SC case.

[84] In the circumstances, I agree with the defendants' invocation of res judicata and/or issue estoppel simply because, the issue of fraud as to whether Thanabalan's motorcycle was involved in the accident existed in the earlier proceedings in the sessions court. So too whether there was a conspiracy to defraud the plaintiff cannot be challenged in these collateral proceedings. The principles of res judicata as expounded by Peh Swee Chin SCJ in the Supreme Court case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 was succinctly explained by Low Hop Bing JCA in *Chemfert Sdn Bhd & Anor v Lim Hua* [2010] 5 MLJ 228; [2010] 7 CLJ 491:

> [23] ... Peh Swee Chin SCJ (as he then was) gave a comprehensive and scholarly account of the doctrine of res judicata, the relevant principles of which we gratefully extract and apply as follows:
>
> (a) res judicata simply means a matter adjudged, and its significance lies in its effect of creating an *estoppel per rem judicatum*;
>
> (b) when a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because *the judgment becomes the truth between such parties who should accept it as the truth — res judicata pro veritate accipitur*;
>
> (c) the public policy of the law is that it is in the public interest that there should be *finality in litigation* — interest *rei publicae ut sit finis litium*;
>
> (d) it is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa*;
>
> (e) both the aforesaid maxims in (c) and (d) are the rationale for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy;
>
> (f) since a res judicata creates an *estoppel per rem judicatum*, the doctrine of res judicata is really the doctrine of *estoppel per rem judicatum* which archaically was described as estoppel by record;
>
> (g) the plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an

opinion and pronounce a judgment, but to *every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time*: per Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100 at p 115; *the 'point' should actually include causes of action, or all causes of action which one of the two parties has against the other, based on, or substantially on the same facts or issues, and not just all issues of law or of fact that are in dispute between the parties*;

(h) one of the exceptional special cases is the effect of a default judgment in subsequent proceedings between the same parties because a default judgment is different from a final judgment on the merits; and

(i) the well-known relevancy of a previous judgment in barring a second suit is seen in s 40 of the Evidence Act 1950, which provides as follows:

The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether the court ought to take cognizance of the suit or to hold the trial.

(j) there are in fact two kinds of *estoppel per rem judicatum*, the first relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first;

(k) the cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action ie cause of action, merges into the final judgment; in layman's language, the cause of action has turned into the final judgment. The cause of action may not be relitigated between the same parties because it is res judicata;

(l) in order to prevent a multiplicity of actions and also in order to protect the underlying rationale of *estoppel per rem judicatum* and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence; see *Public Trustee v Kenward* [1967] 2 All ER 870; [1967] 1 WLR 1062 *Conquer v Boot* [1928] 2 KB 336; *Chamberlain v Deputy Commissioner of Taxation* (1988) 62 ALJR 324 and *LE Walwin & Partners Ltd v West Sussex County Council* [1975] 3 All ER 604;

(m) issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, in law, issue estoppel means a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties; neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision;

(n) issue estoppel prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action: per Peter Gibson J in *Lawlor v Gray* [1984] 3 All ER 345 at p 350.

(o) in preventing such contradiction of the previous judgment, one school of thought holds that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of res judicata, ie the doctrine of *estoppel per rem judicatum*;

(p) our Federal Court prefers the aforesaid contrary view, which represents a correct, even though broader, approach to the scope of issue estoppel and is warranted by the weight of authorities being completely in accord or resonant with the rationale behind the doctrine of res judicata, particularly the question of public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and the expanding resources of the courts being found always one step behind the resulting increase in litigation;

(q) res judicata for this purpose is therefore *not confined to the issues which the court is actually asked to decide*, but covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that *it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them*: per Somervell LJ in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257 and quoted with approval in the Privy Council in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd and another* [1975] AC 581; [1975] 2 WLR 690 (see also *SCF Finance Co Ltd v Masri and another (No 3)* [1987] QB 1028; [1987] 1 All ER 194 (CA); *Bell v Holmes* [1956] 3 All ER 449; [1956] 1 WLR 1359 and *Hoystead and others v Commissioner of Taxation* [1926] AC 155;

(r) the words 'exercising reasonable diligence' in *Henderson*:

(i) necessitate a mental exercise of making a finding as to whether there was diligence, or reasonable diligence, in the earlier failure to bring in at the previous trial the issues which should have been brought in the earlier action and which were not, or in asserting all other causes of action arising out of the same facts in the earlier action and which were not;

(ii) ought to be understood as a gentle rebuke for the failure aforesaid despite the fact that *the party had the opportunity of bringing forward all such issues or asserting all such causes of action*; and

(iii) are not meant to impose a precondition for applying the doctrine of res judicata, but are meant to say that *the non-bringing of the issues would count in any event irrespective of whether the failure was or was*

not deliberate or due to inadvertence or negligence.

(s) the court has the inherent jurisdiction to dismiss an action by applying the doctrine of res judicata against a party, even if it has not been pleaded, as estoppel is based on a question of public policy, and there should be finality in litigation: *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494 at p 498 per Abdoolcader SCJ (as he then was). See also *Chong Kew v Leow Lay & Ors* [2008] 6 MLJ 781 at pp 787–790 (CA).

[85] The nub of the doctrine of res judicata prohibits one from relitigating an issue or defence which has already been determined. That a cause of action would be extinguished once judgment is pronounced even if it may not relate to the same cause of action in the previous suit, and that a party may not bring subsequent proceedings which should and could have been dealt with in earlier proceedings (the '*Henderson v Henderson* principle') was settled by Lord Sumption in the Supreme Court case of *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2013] UKSC 46; [2014] AC 160; [2013] 4 All ER 715; [2013] 3 WLR 299 where he set out the principles of the doctrine as follows:

Res judicata: general principles

[17] *Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins*. As with other such expressions, the label tends to distract attention from the contents of the bottle. *The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings.* This is 'cause of action estoppel'. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. *Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action*, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336; [1928] All ER Rep 120. *Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment.* Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as 'of a higher nature' and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) 13 M & W 494 at 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see s 34 of the Civil Jurisdiction and Judgments Act 1982. *Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties*: *Duchess of Kingston's* case (1776) 20 St Tr 355, [1775–1802] All ER Rep 623. 'Issue estoppel' was the expression devised to describe this principle by Higgins J in *Hoystead v Taxation Comr* (1921) 29 CLR 537 at 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] 1 All ER 341, [1964] P 181 at 197–198. *Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson*

> *(1843) 3 Hare 100 at 115, [1843–60] All ER Rep 378–382, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.* (Emphasis added)

[86] Adopting Peh Swee Chin SCJ and Lord Sumption's approach that commends itself to me, I find that the justice of the present case demands that the SC judgment ought, in the interests of justice, to bar the plaintiff from relitigating the issue of fraud and/or conspiracy. Further, I am of the utmost respectful view that the Rule in *Tradium* applies as the plaintiff who was content to standby, and elected firstly not to intervene and second, to discharge solicitors for Thanabalan is bound by the result of the SC suit and the unequivocally clear finding of fact that Thanabalan is 100% liable for the accident.

[87] Not only that, this is also not a case where the defendants 'must have prevented' the plaintiff 'from placing their case before the court' as discussed in *Seruan Gemilang* and *Chee Pok Choy* in paras 44 and 45 of this judgment, nor a case where evidence not available in the previous proceedings becomes available as propounded in *Sykt Sebati Sdn Bhd v Pengarah Jabatan Perhutanan & Anor* [2019] 2 MLJ 689 where the Federal Court said:

> [43] It is clear however from decided cases that the circumstances alluded to by the Court of Appeal (ie non-consideration of the provisions of the GCA 1949) do not fall within *the exceptions to the doctrine of res judicata which are limited to the following situations: fraud or where evidence not available at the original hearing becomes available* (see *Arnold and others v National Westminister Bank plc* [1991] 3 All ER 41; [1991] 2 AC 93 and *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143). Whether an 'unjust result' or the justice of the case constitutes a further exception to the doctrine of res judicata remains to be seen. For the moment, based on decided cases (as seen above) it is not yet a recognised exception to the doctrine of res judicata.

[88] I agree with defendants' counsel that the plaintiff's reliance on *AmGeneral Insurance Bhd v Iskandar bin Mohd Nuli* to justify its walk away from the SC proceedings is merely an afterthought. In my respectful view, the plaintiff's assertion is untenable and must ring hollow because Messrs SK Lee was only discharged on 14 March 2017, 15 months after the decision of *AmGeneral Insurance Bhd v Iskandar bin Mohd Nuli* was pronounced on 16 December 2015. In my opinion, the plaintiff cannot rely on its ignorance to escape the rule in *Tradium* and res judicata particularly when it has solicitors on record to advise it, and therefore ought to be more vigilant in protecting its rights and interests. In my judgment, the interest of justice and the public policy that there should be finality in litigation and that a litigant should not be vexed more than once in the same cause would be better served if the plaintiff

is prevented from litigating again the issue of fraud and or conspiracy to defraud again in this court. I find the die was cast as soon as the plaintiff walked away from the sessions court after Messrs SK Lee was discharged when the defence filed in the sessions court has raised the vital point of fraud already.

[89] In the ultimate analysis, I am of the considered view that res judicata in the wider sense ought to bar the SC judgment from being impeached.

[90] As for the plaintiff's grievance that the defendants have threatened execution of the SC judgment without first filing a recovery action, the short answer is found in a recent Federal Court case of *AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals* [2022] 5 MLJ 825; [2022] 8 CLJ 175, which for all practical purposes, emphasised that an insurer is bound to settle the judgment sum against the insured, and without the need for the third party to file a recovery action by the claimant. Abdul Rahman Sebli FCJ delivering the judgment of the court said this:

> [102] The first appellant had another argument. It was contended that the respondent as the third party claimant could not apply to set aside the order pursuant to O 35 r 1(2) of the Rules of Court 2012 because he had a specific remedy provided by s 96(1) of the RTA to file for recovery against the insurer. The argument must fail. *There is nothing in s 96(1) to say that the third party claimant must first obtain another judgment against the insurer before he could proceed to enforce the judgment that he had earlier obtained against the insured. After all, the judgment debt of the insured becomes the judgment debt of the insurer:* See *Pacific & Orient Insurance Co Berhad v Kamacheh a/p Karuppen* [2015] MLJU 72; [2015] 4 CLJ 54. *The insurer is bound to settle the judgment sum without the need for another action by the third party claimant, ie, recovery action against the insurer once the conditions in s 96(2) and (3) are fulfilled.*
>
> [103] *Therefore, the question of the respondent having to file for recovery proceedings under s 96(1) against the first appellant as contended by learned counsel does not arise at all:* See also the decisions of the Court of Appeal in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947 and *Yeap Tick In* which decisions on this point we are in agreement with. In *Muniammah Muniandy*, this is what Ramly Ali JCA (as he then was) said:
>
> > [21] *Nowhere does s 96(1) of the Road Transport Act 1987 say that the respondent must first obtain another judgment against the appellant before she can proceed to enforce the judgment earlier obtained by the respondent against the insured.* Therefore, the question of the respondent having to file a recovery proceeding under s 96(1) against the appellant, as contended by the appellant in its memorandum of appeal, does not arise at all. *In short, the respondent, who had obtained a monetary judgment against the insured which has not been stayed, has the right under s 96(1) to enforce the said judgment against the insurer without having to first file a recovery proceeding against the insurer.*

[91] The court has taken note that the plaintiff in its submissions have

withdrawn prayers 2, 3, and 4 leaving prayers 1, 5, 6 and 7.

[92] Bearing in mind that the burden was on the plaintiff to put sufficient material before the court to discharge its burden of proof, after considering the pleadings, evidence and the submissions of the parties, in my judgment, the plaintiff has failed to discharge its 'burden of proof' under ss 101 and 102 of the Evidence Act on the balance of probabilities and as such is not entitled to the relief sought. I therefore dismiss the plaintiff's claim with costs subject to allocator.

[93] As a postlude, I ought to state that I have found it necessary to discuss authorities not cited by either side both local and foreign but which I considered pertinent to the crux of the claim made and the contentions raised. This does not however in my view necessitate any further argument or detract from the basic propositions advanced and argued by both sides.

Claim dismissed with costs subject to allocatur.

Reported by Nabilah Syahida Abdullah Salleh